88-718

NO. _____

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Supreme Court, U.S.
FILED
SEP 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROBERT M. SCHUCKER,
PETITIONER,

V.

TERRY G. ROCKWOOD; JAMES C. FUKUHARA; DEWAR, ROMIG & ROCKWOOD, INC.; ANNE D. McGOWAN; DeLAY, LAREDO & McGOWAN; MAURICE JOURDANE,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMENDED PETITION FOR WRIT OF CERTIORARI

ROBERT M. SCHUCKER
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QUESTIONS PRESENTED FOR REVIEW

1. May a State trial court judge be held liable for the deprivation of liberty and property resulting from his exercise of subject-matter jurisdiction during a period when he knew or should have known that such jurisdiction was statutorily stayed?

2. May an attorney be held liable for the deprivation of liberty and property resulting from his bringing of matters before a State trial court during a period when the attorney knew or should have known that the trial court's subject-matter jurisdiction was statutorily stayed?

PARTIES: The names of all parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are contained in the caption of the case in this Court.

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1. Opinion of the U. S. Court of Appeals for the Ninth Circuit

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Stump v. Sparkman (1978) 453 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 — 6

Vosburg v. Vosburg (1902) 137 Cal 493, 68 P. 694 — 18

TEXTS AND TREATISES:

Louisell & Hazard, Pleading & Procedure, State & Federal, 4th Ed. Foundation Press (1979), 1097 — 18

OPINIONS DELIVERED IN THE COURTS BELOW

Robert M. Schucker (hereinafter "Schucker"), petitioner here, appellant in the Court of Appeals, and plaintiff in the District Court, respectfully petitions this Court for a writ of certiorari to review the Opinion of the U. S. Court of Appeals for the Ninth Circuit, filed May 17, 1988 and amended June 29, 1988, in Schucker v. Rockwood, et al. appeal no. 86-2900.

The matter was taken to the Court of Appeals on appeal from the Order and Judgment of the U. S. District Court for the Northern District of California, filed June 30, 1986 and entered July 1, 1986 (motion to alter or amend judgment denied, October 23, 1986), in Schucker v. Rockwood, et al., case no. C-86-20009-WAI.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is believed to be statutorily conferred by Title 28, U. S. Code, section 1254(1).

Supreme Court Rule 17.1(c) refers. Schucker believes that the lower court decisions have been in conflict with applicable decisions of the Supreme Court, to wit: As to the former judge defendant, Stump v. Sparkman (1978) 453 U.S. 349, 98 S.Ct. 1099, 55 L.Ed. 2d 331, its antecedents, especially Bradley v. Fisher (1872) 13 Wall. 335, 20 L.Ed. 646, and its progeny; As to the attorney and law firm defendants, Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 and its progeny, especially Lugar v. Edmondson Oil Co.,Inc. (1982) 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

...(N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- The Constitution of the United States of America, Amendment XIV, Section 1

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

- Title 42, U. S. Code, section 1983

Except as provided in Sections 917.1 through 917.9 and in Section 117ha[1], the perfecting of an appeal stays proceedings in the trial court upon the judgment appealed from or

[1]These exceptions are contained in the Appendix to this petition. None of the exceptions are relevant to the issues herein.

upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

- California Code of Civil Procedure (hereinafter, "CCP"), section 916(a)[2]

STATEMENT OF THE CASE

INTRODUCTION

Underlying the District Court case was a family law matter in the Superior Court of the State of California, County of Monterey. Schucker is a retired Regular commissioned officer of the United States Navy. The family law matter specifically concerned the question of Schucker's Navy retired pay as community property. At a point in time, Schucker's former wife appealed a Superior Court order, denying her any part of his Navy retired pay

[2]In effect at all times relevant, through June 30, 1983. Effective July 1, 1983, Section 117ha was renumbered to read Section 117.7.

as community property, to the California Court of Appeal.

The subsequent District Court case was brought because of orders issued and actions taken by the Superior Court during the pendency of the appeal in the Court of Appeal. Schucker alleges that the Superior Court was proceeding under mere color-of-law at that time, having been statutorily divested of subject-matter jurisdiction by CCP section 916 so that such jurisdiction could be invested in the California Court of Appeal.

FACTS

Prior to June 26, 1981, a final judgment of dissolution of marriage was handed down in the Superior Court of California, County of Monterey, in a case in which Schucker and his former wife were parties. Incorporated in the final judgment by reference was an interlocutory judgment which awarded Mrs Schucker a portion of Schucker's

Navy retired pay as community property.

On June 26, 1981, the U. S. Supreme Court handed down its decision in McCarty v. McCarty (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, in which the Court held that Federal law precludes a state court from dividing military retired pay pursuant to state community property laws.

Based entirely upon McCarty, and with notice to his former wife, Schucker ceased paying her any part of his Navy retired pay as community property.

Shortly thereafter, Schucker was ordered to appear in the Superior Court of Monterey County upon his former wife's application, and there to show cause why he should not be found in contempt for not continuing payments of his military retired pay to his former wife as community property. The matter was heard by the Hon. Harkjoon Paik, Judge of the Superior Court, on August 21, 1981. Judge Paik dismissed the Order to Show Cause re: Contempt (OSC), thus holding that Schucker was not in civil

contempt of court for not continuing the payments.

Schucker's former wife subsequently brought a "Motion for Distribution of Community Property" before the Monterey County Superior Court, in an attempt to achieve by motion that which had been denied her by OSC (i.e., court enforcement of the provision in the underlying divorce decrees which awarded her a part of Schucker's Navy retired pay as community property). The matter has heard on November 27, 1981, by the Hon. Ralph M. Drummond, Judge of the Superior Court. Judge Drummond denied the motion by minute order entered November 27, 1981.

Schucker was informed and believed and thereon, in his Federal complaint alleged, that the Minute Order of November 27, 1981 made the Navy-retired-pay-as-community-property portion of the interlocutory judgment unenforceable, effectively setting it aside.

On January 6, 1982, Schucker's former wife, through her attorneys, filed a

Notice of Appeal, appealing the Superior Court's November 27, 1981 minute order, denying her motion, to the California Court of Appeal.

Schucker was informed and believed and thereon, in his Federal complaint alleged, that the filing of the Notice of Appeal statutorily withdrew from the Superior Court subject-matter jurisdiction over "the order appealed from or upon the matters embraced therein or affected thereby", under CCP section 916.

Notwithstanding the pendency of her appeal, on or about March 31, 1983, Mrs Schucker, through her attorneys, sought and obtained from the Monterey Superior Court, ex parte, an Order to Show Cause re: Contempt (OSC), requiring Schucker to appear in that court and there to show cause why he should not be held in contempt for not paying the Navy-retired-pay-as-community-property.

The OSC came on for hearing before the Hon. Maurice Jourdane, then a judge of the

Superior Court, on May 6, 1983. Schucker made a special appearance for the express purpose of, and limited to, challenging the subject-matter jurisdiction of that court. The judge directed both sides to submit written points and authorities, which were subsequently submitted on May 20, 1983.

By written decision dated June 2, 1983, Judge Jourdane found Schucker to be guilty of civil contempt of court for not complying with the Navy-retired-pay-as-community-property provisions of the interlocutory divorce decree, notwithstanding that those provisions had effectively been set aside by the court's November 27, 1981 minute order; that the November 27, 1981 minute order had been appealed; that the appeal was then pending; and that, because of the pendency of the appeal, the Superior Court then lacked appropriate subject-matter jurisdiction and was, therefore, proceeding under mere color-of-law.

On June 24, 1983, Judge Jourdane ordered Schucker, by July 29, 1983, to recommence

Navy-retired-pay-as-community-property payments to Mrs Schucker and to post an undertaking for alleged arrearages in such payments.

On July 29, 1983, in compliance with Judge Jourdane's order of June 24, 1983, Schucker recommenced the payments to his former wife.

On July 29, 1983, Schucker advised Judge Jourdane that he was financially unable to post the undertaking ordered on June 24, 1983. Judge Jourdane thereupon found Schucker guilty of civil contempt of court for not posting the undertaking. The Superior Court continued sentencing on this contempt conviction until after the Court of Appeal reported its decision on Mrs Schucker's appeal.

On August 9, 1984, the California Court of Appeal returned the case to the Superior Court, by remittitur.

Schucker was informed and believed and thereon, in his Federal complaint alleged, that the remittitur of August 9, 1984 dives-

ted the Court of Appeal of subject-matter jurisdiction and reinvested such jurisdiction in the Superior Court.

On September 21, 1984, Judge Jourdane sentenced Schucker on the July 29, 1983 civil contempt of court conviction.

The September 21, 1984 sentencing on the July 29, 1983 conviction ultimately resulted in Schucker's incarceration, on a bench warrant (warrant of attachment) issued by Judge Jourdane, in the Riverside County, California, Jail, and subsequently in the Monterey County, California, Jail. Schucker's final day of incarceration was December 31, 1984.

On December 24, 1985, Schucker filed his complaint in the District Court civil rights case which underlies this petition. The gravamen of the complaint: The Monterey court proceeded in the clear absence of subject-matter jurisdiction while Schucker's former wife's appeal was pending in the California Court of Appeal, and thus pro-

ceeded under mere color-of-law, The deprivation of his property and his liberty as a result of this color-of-law proceeding violated Schucker's due process and equal protection rights under the Fourteenth Amendment. Damages were sought from Mrs Schucker's attorneys and from former Judge Jourdane.

The District Court dismissed Schucker's complaint under Fed. R. Civ. P. rule 12(b)(6) by Order entered July 1, 1986. The thrust of the Distrcit Court's Order as to the California judge seemed to be that Judge Jourdane had simply made a mistake and exercised jurisdiction which he did not have, and that jurisdictional mistakes do not give rise to 42 U.S. Code section 1983 actions. Further, that being on the winning side of a lawsuit does not make state actors of attorneys. Schucker's timely filed subsequent motion to alter or amend judgment was denied on October 23, 1986.

Schucker appealed to the Court of Appeals for the Ninth Circuit, which affirmed the District Court by Opinion filed May 17,

1988 and amended June 29, 1988. In its amended opinion, the appellate court held, in substance, that the Monterey court had not proceeded in the "clear absence" of jurisdiction; thus, that the Monterey judge was protected by the judicial immunity doctrine. As had the District Court, the Court of Appeals stated that being on the winning side of a lawsuit does not make state actors of lawyers.

This petition followed.

THE BASIS FOR ORIGINAL FEDERAL JURISDICTION

The basis for Federal jurisdiction in the U. S. District Court for the Northern District of California was Title 28, U. S. Code, section 1343.

ARGUMENT

On November 27, 1981, the Superior

Court of Monterey County (Judge Drummond) denied Mrs Schucker's motion that she be paid a portion of Schucker's Navy reited pay as community property. On January 6, 1982, Mrs Schucker filed her Notice of Appeal.

The California authorities make clear that a Notice of Appeal divests the trial court of subject-matter jurisdiction over the order appealed or the matters embraced therein or affected thereby. CCP section 916; San Francisco Savings Union v. Myers (1887) 72 Cal 161, 163, 13 P. 402; Ex parte Queirolo 119 Cal 635; Vosburg v. Vosburg (1902) 137 Cal 493, 495, 68 P. 694; Estate of Hanley (1943) 23 Cal 2d 120, 142 P.2d 423; Bracey v. Gray (1945) 71 CalApp 2d 206, 162 P.2d 314 cert denied 327 U.S. 809, 66 S.Ct. 961, 90 L.Ed. 1033; Ex parte Lukasik (1952) 108 CalApp 2d 438, 39 P.2d 492; Beresh v. Sovereign Life Ins. Co. of Calif. (1979) 92 CalApp 3d 547, 155 CalRptr 74; In re Marriage of Horowitz (1984) 159 CalApp 3d 547, 205 CalRptr 880; Louisell & Hazard, Pleadings & Procedure, State & Fed-

eral, 4th Ed., Foundation Press (1979), at 1097.

In Mrs Schucker's appeal, the matter "embraced therein or affected thereby" was Schucker's Navy retired pay as community property, past, present or future. The Superior Court had denied any part of it to Mrs Schucker as community property.

In Stump v. Sparkman, ibid, this Court, relying largely on the post-Civil War case of Bradley v. Fisher, ibid, said, in relevant part:

> Judges ... are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction ... . Bradley v. Fisher, as discussed in Stump v. Sparkman, ibid, at 1104.

> A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. ... (Emphasis added.) Bradley, ibid, 351-352, as quoted in Stump, ibid, footnote at 1104.

> The doctrine of judicial immunity ... allows a judicial officer, in the exercise of the authority vested in him to be free (of) ... fear of suit. (Emphasis added.) Bradley, ibid, in Stump, ibid, 1108.
>
> But the conduct of a judge surely does not become a judicial act merely on his own say-so. A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity. (Justice Stewart's dissent in) Stump, ibid, 1110.

It is Schucker's belief that the fact that the Monterey court was without subject-matter jurisdiction during the 1982-1984 pendency of Mrs Schucker's appeal is without substantial controversy. Nevertheless, both the District Court and the Court of Appeals found that such jurisdiction was not "clearly absent", the standard enunciated in Bradley and Stump, necessary to pierce the judicial immunity doctrine. The District Court said, in effect, that a State trial judge should not be held liable for making a mistaken jurisdictional call. But note that Schucker's complaint never alleged a mistake, or negligent jurisdictional decision, by then-Judge

Jourdane. In approximately a dozen different places in his complaint, Schucker alleged that Judge Jourdane's decision to exercise subject-matter jurisdiction was taken with full knowledge of the fact that he was without such jurisdiction. Further, this case was dismissed at the pleadings stage, and without the introduction of evidence; thus, the District Court had nothing on which to base such a negligence determination, if that is what the District Court, indeed, did.

Ninth Circuit's Opinion simply held that the Monterey court had not acted in the "clear absence" of jurisdiction.

Under CCP section 916, the Monterey court's subject-matter jurisdiction was "stayed". Does such a stay of subject-matter jurisdiction work a "clear absence" of jurisdiction such that, under the Court's Stump decision, a judge who proceeds in a knowing violation of the statutory stay can be held liable for the Constitutionally-protected rights his actions violate?

An analogy might be drawn between the present case and one in which a State trial ourt judge proceeds against a bankrupt debtor, knowing that he does so in the face of a Title 11, U. S. Code, section 362 stay. May the State trial judge proceed with impunity? Or does an 11 U.S.C. 362 stay place a State trial judge in the "clear absence" of jurisdiction, so that, if he chooses to flaunt his power in the face of the stay, he can be held liable? And, if the judge cannot be held liable under these circumstances, what remedy does the bankrupt debtor have if a State trial judge chooses to violate a Section 362 stay, or an appellee have if a State trial judge chooses to take his property and his liberty in clear violation of a CCP section 916-type stay?

Both the District Court and the Court of Appeals relied on Aldabe v. Aldabe (9th Cir. 1980) 616 F.2d 1089, to find that being on the winning side of a lawsuit does not make an attorney a "State actor" for the

purposes of the Fourteenth Amendment. Schucker believes that both courts missed the point, This Court, in Lugar v. Edmondson Oil, ibid, held that one who seeks and obtains the aid and assistance of State officials who, themselves, are acting under mere color-of-law, can be held liable, as a "State actor", for subsequent deprivations of Constitutionally-protected rights.

The Aldabe decision is irrelevant to the present lawsuit because, in Aldabe, there apparently was no issue of subject-matter jurisdiction; thus, no issue of a court acting under mere color-of-law. Although the trial court, in Aldabe, might have made incorrect decisions based on improper actions of Aldabe's adversary's attorneys, at least the trial court had the requisite jurisdiction. In Schucker's case, the trial court did not have appropriate subject-matter jurisdiction; it was Justice Stewart's "loose cannon".

In Schucker's case, one or another

of Mrs Schucker's attorneys prepared and filed the 1981 motion which was denied; one or another prepared and filed the 1982 Notice of Appeal which divested the trial court of subject-matter jurisdiction; one or another of them sought and obtained the 1983 OSC which triggered-off the actions underlying the District Court lawsuit. These attorney and law firm defendants in the Federal case not only knew that the Superior Court was without subject-matter jurisdiction, they were the cause of the divestment!

CONCLUSIONS

Schucker concludes that when a State trial court proceeds in the face of a statutory stay of the court's subject-matter jurisdiction, the victim of such proceedings should be able to recover in damages from the judge, under this Court's

holding in Stump.

Schucker further concludes that attorneys who instigate proceedings in State courts whose subject-matter jurisdiction has been knowingly, statutorily, stayed, can be held liable as "State actors" under this Court's Lugar holding.

Schucker respectfully requests that this Court issue its Writ of Certiorari to the U. S. Court of Appeals for the Ninth Circuit, in this case.[1/]

Respectfully submitted:

ROBERT M. SCHUCKER
Petitioner, Pro Se

October 26, 1988

1/. The original petition in this matter was received by the Clerk of the Court on September 24, 1988, and found to be unacceptable because two of the appendices were in less than 10-point Pica type and for other typographical reasons. The petition was returned to the petitioner by letter dated October 3, 1988, for correction and resubmission.

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. SCHUCKER,
Plaintiff-Appellant,

v.

TERRY G. ROCKWOOD; JAMES C. FUKUHARA; DEWAR, ROMIG & ROCKWOOD, INC.; ANNE D. McGOWAN; DeLay, LAREDO & McGOWAN; MAURICE JOURDANE,
Defendants-Appellees.

No. 86-2900

D.C. No. CV-86-20009-WAI

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding

Submitted March 24, 1988*

Filed May 17, 1988
Amended June 29, 1988

Before: J. Clifford Wallace, Joseph T. Sneed and Cecil F. Poole, Circuit Judges.

Per Curiam

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

SUMMARY

Judges/Civil Rights

Appeal from dismissal of 42 U.S.C. § 1983 action. The court affirmed holding that conclusory allegations that trial judge conspired with law firms are insufficient to support a section 1983 claim.

Schucker appeals pro se the district court's dismissal of his 42 U.S.C. § 1983 action. Schucker alleged that he had been deprived his liberty and property without due process of law.

[1] A judge loses absolute immunity only when he acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature. [2] At most, Schucker alleges that Judge Jourdane misinterpreted a statute and erroneously exercised jurisdiction. Even assuming this, the act was not done "in the clear absence of jurisdiction." [3] Schucker next argued, in essence, that in accepting the law firms' jurisdiction argument, in ordering him to make payments to his ex-wife, in allowing the law firms to serve an order to show cause regarding contempt arising from his failure to make the payments, and in ordering Schucker jailed for refusing to make payments, Judge Jourdane became part of a conspiracy to deprive him of his liberty and property. [4] Merely resorting to the courts and being on the winning side of a lawsuit does not make a private party a joint actor with the judge. Schucker's conclusory allegations that the judge conspired with the law firms are insufficient to support his section 1983 claim.

COUNSEL

Robert M. Schucker, pro se, Riverside, California, for the plaintiff-appellant.

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Carmela M. Bowns, De Lay & Laredo, Pacific Grove, California; Don Roberson, Dewar, Romig & Rockwood, Inc., Monterey, California; Stephen A. Lankes, Holbrook, Lankes & Groff, Salinas, California, for the defendants-appellees.

ORDER

The opinion filed on May 17, 1988, is amended as follows:

On page 7750, first full paragraph, line 3, the following is inserted between "Appeal" and "reversed": ", among other things,".

On page 7750, first full paragraph, lines 6-8, the language after the word "distribution" to the end of the sentence is deleted.

With the above changes, appellant's petition for rehearing is denied.

OPINION

PER CURIAM:

Schucker appeals pro se the district court's dismissal of his 42 U.S.C. § 1983 action. Schucker alleged that he had been deprived his liberty and property without due process of law. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

We review a dismissal of an action de novo. *Whittington v. Whittington*, 733 F.2d 620, 621 (9th Cir. 1984). Dismissal of a pro se complaint without leave to amend is proper only if it is " 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.' " *Noll v. Carlson*, 809

F.2d 1446, 1448 (9th Cir. 1987), *quoting Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (per curiam). Schucker does not contend that the district court should have allowed him to amend his complaint nor does he suggest what amendment he would make had he been allowed to do so.

The district court dismissed Schucker's claim against Judge Jourdane on the ground that the judge was absolutely immune from civil liability. Schucker now argues that Judge Jourdane acted in the "clear absence" of jurisdiction because a notice of appeal had been filed in the California Court of Appeal arising from the community property dispute and therefore Judge Jourdane lost his judicial immunity.

[1] Judges are absolutely immune from damages actions for judicial acts taken within the jurisdiction of their courts. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc) (*Ashelman*). Grave procedural errors or acts in excess of judicial authority do not deprive a judge of this immunity. *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978) (*Stump*). A judge loses absolute immunity only when he acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature. *See Forrester v. White*, 108 S. Ct. 538, 544-46 (1988); *Stump*, 435 U.S. at 356-57 & n.7; *Ashelman*, 793 F.2d at 1075.

[2] At most, Schucker alleges that Judge Jourdane misinterpreted a statute and erroneously exercised jurisdiction and thereby acted in excess of his jurisdiction. Even assuming Judge Jourdane's assumption of jurisdiction was "in excess of his jurisdiction," the act was not done "in the clear absence of jurisdiction." *See Stump*, 435 U.S. at 357 n.7. Accordingly, the district court correctly dismissed Schucker's claim against Judge Jourdane.

The district court also dismissed Schucker's claim that Judge Jourdane and the law firms conspired to assert jurisdiction notwithstanding that jurisdiction allegedly only existed

in the California Court of Appeal due to the filing of a notice of appeal. Schucker made his jurisdictional argument in Judge Jourdane's court. Judge Jourdane concluded that, notwithstanding the filing of the notice of appeal from the superior court's denial of Mrs. Schucker's motion for a distribution of Schucker's military retirement pay as community property pursuant to the 1976 amended interlocutory judgment of dissolution of marriage, his court retained jurisdiction because the order appealed from was for the payment of money. After resolving the jurisdictional argument, Judge Jourdane found Schucker guilty of civil contempt of court for not complying with the distribution of the military retirement pay provisions of the 1976 amended interlocutory judgment. At the sentencing hearing on June 24, 1983, Judge Jourdane ordered Schucker to comply with the 1976 amended interlocutory judgment and to post "an undertaking for alleged arrearages in such payments."

[3] The basis of the alleged conspiracy was that approximately one month after Judge Jourdane issued this sentence, the law firms served an order to show cause why Schucker should not be held in contempt for failing to make required payments in accordance with the order. Schucker alleged that the law firms served the order in open court before Judge Jourdane. In essence, Schucker's complaint alleges that in accepting the law firms' jurisdictional argument, in ordering him to make payments to his ex-wife in accordance with the state divorce decree, in allowing the law firms to serve an order to show cause regarding contempt arising from his failure to make the payments, and in ordering Schucker jailed for refusing to make payments, Judge Jourdane became part of a conspiracy to deprive him of his liberty and property.

[4] The district judge dismissed this claim because he concluded that the mere invocation of state judicial process does not convert a private party's action into state action even if the plaintiff alleges a "conspiracy" between the private parties and the judge. Although we recognize that an individual may

state a section 1983 action against private parties that conspire with a state actor immune from civil liability, *see Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980) (allegations that private parties bribed a judge in order to obtain a favorable ruling), "merely resorting to the courts and being on the winning side of a lawsuit does not make a [private] party a joint actor with the judge." *Id.* at 28. Schucker's conclusory allegations that Judge Jourdane conspired with the law firms are insufficient to support his section 1983 claim. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (per curiam). Invoking state legal procedures does not constitute "joint participation" or "conspiracy" with state officials sufficient to satisfy section 1983's state action requirement. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 n.21 (1982).

Finally, Schucker argues that the district court improperly considered an unpublished California Court of Appeal opinion. In that opinion, the California Court of Appeal, among other things, reversed the denial of Mrs. Schucker's motion to compel Schucker to pay a portion of his military retirement pay to Mrs. Schucker as part of the community property distribution. Schucker contends that in considering this opinion the district court should have treated the defendants' motion to dismiss as a motion for summary judgment. *See* Fed. R. Civ. P. 12(b).

We disagree. The district court's order dismissing Schucker's complaint merely repeats the facts from the California opinion that Schucker alleged in his complaint. Thus, the California appellate court opinion, to the extent the district court referred to it, was part of the pleadings and the district court properly considered it in granting the motion to dismiss.

On appeal, the defendants request attorneys' fees under 42 U.S.C. § 1988, Fed. R. App. P. 38, and Fed. R. Civ. P. 11. We award attorneys' fees against an unsuccessful appellant only if the action is meritless, in the sense that it is groundless or frivolous. *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d

1361, 1367 (9th Cir. 1987) (per curiam) (discussing Fed. R. App. P. 38); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) (discussing Fed. R. Civ. P. 11); *Dooley v. Reiss*, 736 F.2d 1392, 1396 (9th Cir.) (discussing section 1988), *cert. denied*, 469 U.S. 1038 (1984). Because we do not believe that Schucker's appeal was groundless, we refuse to award attorneys' fees to the appellees. Schucker shall, however, bear the appellees' costs on appeal.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT M. SCHUCKER, Plaintiff, v. TERRY G. ROCKWOOD, et al., Defendants.	) NO. C-86-20009-WAI	O R D E R

The motions of all defendants to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6) came on regularly for hearing on April 24, 1986. Upon consideration of the papers submitted and argument of counsel, IT IS HEREBY ORDERED THAT THE COMPLAINT BE DISMISSED WITHOUT LEAVE TO AMEND AS TO ALL DEFENDANTS. The request for sanctions pursuant to Fed. R. Civ. P. 11 IS HEREBY DENIED.

I. ALLEGATIONS OF COMPLAINT

This case arises out of a dissolution

judgment and subsequent enforcement proceedings. A final dissolution of the Schucker marriage was entered in Monterey County Superior Court on or about July 1, 1977. Plaintiff has sued the trial court judge[1] that presided over orders to show cause (OSCs) re: contempt following the dissolution. Plaintiff has also named the two (2) law firms[2] that represented Ms. Schucker in the dissolution and subsequent enforcement proceedings. Plaintiff alleges that Judge Jourdane and the law firms deprived him of his civil rights in violation of 42 U.S.C. 1983. The gist of the complaint is that Judge Jourdane and the law firms conspired to assert improper Superior Court jurisdiction over the various enforcement proceedings following the dissolution.

The procedural history of the case, as alleged in plaintiff's thirty-three (33) page complaint, is complex. Sometime in 1981, plaintiff stopped paying his ex-spouse any part of his Navy retirement pay.

Plaintiff based this decision on McCarty v. McCarty, 453 U.S. 210 (1981).[3] Ms. Schucker then brought a motion for distribution of her community property interest in the Navy pension. This motion was denied by a Judge Drummond pursuant to a minute order entered November 27, 1981. Ms. Schucker appealed this order by notice filed January 6, 1982.

Two (2) motions were then brought by Ms. Schucker. A motion for increased child support was brought on January 14, 1986 and was subsequently granted by Judge Drummond. A writ of execution regarding the Navy pension was obtained pursuant to a March 25, 1983 order by Judge Farrel. (The Navy did not allow the pension to be garnished.)

Judge Jourdane's first involvement in the case is in May 1983. Plaintiff appeared before Judge Jourdane on May 6, 1983 in response to an OSC re: contempt for non-payment of monies owed to Ms. Schucker. Judge Jourdane was allegedly enforcing a 1977 interlocutory judgment of dissolution

which required payment of the Navy pension to Ms. Schucker. Plaintiff was held in contempt of court by order dated June 2, 1983. Plaintiff's writ of prohibition was denied.

Judge Jourdane next presided over various OSC hearings and related matters. Plaintiff moved to set aside the 1977 final judgment of dissolution on the grounds of extrinsic fraud. The motion was denied by Judge Jourdane pursuant to a August 30, 1983 minute order. Plaintiff appealed this order. The appeal was consolidated with the pending appeal of the November 1981 Judge Drummond minute order.

The California appellate court, in an opinion dated May 23, 1984, (A015208), ruled against plaintiff on both appeals. The November 1981 minute order by Judge Drummond was reversed. The August 1983 minute order by Judge Jourdane was affirmed. The Appellate Court assessed sanctions against plaintiff for a frivolous appeal.

A bench warrant was issued by Judge Jourdane on December 28, 1984 for plain-

tiff's arrest. Plaintiff was incarcerated at Monterey County Jail from December 28, 1984 through December 31, 1984.

The gravamen of the complaint is that Judge Jourdane joined a conspiracy which existed between the two (2) law firms. Specifically, paragraph 22 of the complaint alleges that the law firms:

> (C)onspired...to continue to seek Superior Court exercise of jurisdiction over the matters on appeal during the pendency of the appeal, and to seek to further deprive the plaintiff of more of his property under color of law, in further deprivation of the plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States."

Paragraph 36 of the complaint alleges that Judge Jourdane joined the conspiracy by allowing the Dewar attorney (Fukuhara) to serve plaintiff with an order to show cause regarding contempt of court for non-payment of monies owed to Ms. Schucker. The order was allegedly served in open court before Judge Jourdane.

Along with the above-mentioned conspiracy, the law firms allegedly violated

plaintiff's civil rights by seeking contempt orders for his non-payment of monies owed to Ms. Schucker. In example, paragraph 32 alleges that the law firms sought an OSC re: contempt before payment was even due. Paragraph 41 alleges that the law firms held an improper ex parte hearing with Judge Silver.[4]

II. JUDICIAL IMMUNITY

A judge is entitled to absolute immunity for judicial acts, "even where such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly (fn. ommitted). Stump v. Sparkman, 435 U.S. 349, 355-56 (1978), quoting Bradley v. Fisher, 13 Wall 335, 351, 20 L.Ed. 646 (1872). A judge loses this immunity "only when he has acted in the "clear absence of all jurisdiction." Stump, 435 U.S. 356-57, quoting Bradley, 13 Wall 351, 20 L. Ed. 646.

The intital issue is whether the Superior Court had jurisdiction over the Schucker divorce proceedings following the January 6, 1982 appeal. Unless such jurisdiction is "clearly absent", Judge Jourdane is abso-

lutely immune from civil liability flowing from his judicial acts. Stump, 435 U.S. 356-57. The court finds that the Superior Court jurisdiction was not "clearly absent" and hence no claim can be stated against this defendant.

Accepting as true the allegations of the complaint, Judge Jourdane usurped the jurisdiction of the appellate court by requiring Plaintiff to comply with the 1976 amended interlocutory judgment regarding the Navy pension. That judgment had never been appealed. While this court expresses no opinion as to whether Judge Jourdane properly asserted jurisdiction during the pendency of the appeal, this court finds that such jurisdiction was not so "clearly absent" so as to negate the judicial immunity. Stump, 435 U.S. 356-57.

Plaintiff argues that his case falls within the rule of Ashelman v. Pope, 769 F. 2d 1360 (9th Cir. 1985). In Ashelman, the pro se defendant in a criminal action brought a section 1983 suit. The complaint

specifically alleged extra-judicial agreements between the District Attorney and the judge. The judge and the District Attorney allegedly agreed to deprive the pro se defendant access to the law library and otherwise make the presentation of his defense difficult. The Ninth Circuit found that these alleged prior agreements were not "judicial acts" and hence the judicial immunity would not protect the judge from civil liability. 769 F.2d 1361-62.

Here, plaintiff makes no allegation of such extra-judicial agreements involving Judge Jourdane. Nor does it appear from the record before this court that the complaint could be so amended. See Aldabe, 616 F.2d 1089 (trial court dismissal of section 1983 action against judge and law firms affirmed where allegations of conspiracy were conclusory); see also Dahlberg v. Becker, 748 F.2d 85 (2nd Cir. 1984) (trial court dismissal of section 1983 action against judge and law firms affirmed where complaint was devoid of "meeting of the minds" or "intent

to conspire" allegations.) The court finds the Aldabe and Dahlberg cases on point. Accordingly, the complaint against Judge Jourdane is dismissed without leave to amend.

III. LIABILITY OF LAW FIRMS

In Section II, supra, the allegations of a conspiracy between Judge Jourdane and the law firms were examined to determine if a "non-judicial" act had been pled so as to make the judicial immunity inapplicable. In reaching the conclusion that no such "non-judicial act" had been pled, the court necessarily found the allegations of a conspiracy between Judge Jourdane and the law firms insufficient.[5] Because no sufficient allegations of a conspiracy involving a "state actor" have been made, the section 1983 action against the "non-state actor" law firms must necessarily fail. See Aldabe, 616 F.2d 1089; see also Dahlberg, 748 F.2d 85. Accordingly, the claims against these defendants are dismissed without leave to amend.

Plaintiff's section 1983 claim is pre-

mised on the allegation that Judge Jourdane and the law firms conspired to assert jurisdiction where such jurisdiction rested only with the appellate court. Were such allegations sufficient to state a section 1983 claim, then any party believing jurisdiction was improper would have such a claim against opposing counsel. All improper jurisdictional rulings by a trial judge would give rise to a section 1983 claim against that judge and the opposing counsel who argued that jurisdiction existed. This court declines to reach such a result.

In conclusion, the court finds the following observation by the Ninth Circuit in Aldabe appropriate:

> (Plaintiff's) dissatisfaction with the property settlement reached in the prior divorce proceedings, and her conclusory allegations...(of conspiracy)...are insufficient to a section 1983 claim."

616 F.2d 1092. Mr. Schucker has unsuccessfully sought to have the 1977 dissolution set aside by the trial court. His subsequent appeal of that decision was found to be

frivolous by the appellate court. As in Aldabe, Mr. Schucker's continued dissatisfaction with those dissolution proceedings simply does not rise to the level of a civil rights violation.

IV. SANCTIONS

The Dewar law firm has requested an award of sanctions pursuant to Fed. R. Civ. P. 11. This case presents a close issue as to whether such sanctions are appropriate. The court, in its discretion, declines to award such sanctions.

V. CONCLUSION

Based on the foregoing, the complaint is DISMISSED WITHOUT LEAVE TO AMEND AS TO ALL DEFENDANTS.[6] The request for sanctions is DENIED.

DATED: 6-26-86

WILLIAM A. INGRAM
United States District Judge

FOOTNOTES

1/ Judge Jourdane was a Superior Court judge in Monterey County at all relevant times herein.

2/ The De Lay law firm initially represented Ms. Schucker. The Dewar law firm was substituted in as counsel of record on or about October 11, 1983. Ms. McGowan, an attorney with the De Lay law firm, is named as an individual defendant. Mr. Rockwood and Mr. Fukuhara, attorneys with the Dewar law firm, are also named as individual defendants. The above-mentioned defendants are hereinafter collectively referred to as the "law firm defendants."

3/ The Uniformed Services Former Spouses Protection Act, 10 U.S.C. 1408, was enacted to preclude subsequent applications of McCarty. In Re Marriage of Buikema, (1983) 139 Cal.App. 3d 689, 691.

4/ Judge Silver is not named as a defendant in the complaint. Judges Drummond and Farrel are also not named in the complaint. These judges, like Judge Jourdane, exercised jurisdiction over the Schucker dissolution while the January 6, 1982 appeal was pending.

5/ The court recognizes that a section 1983 action may still be stated against private parties that conspire with a state actor immune from civil liability. See Dennis v. Sparks, 449 U.S. 24 (1980) (Section 1983 action stated against attorneys who allegedly bribed trial judge to issue preliminary injunction, even though judge was immune from section 1983 civil liability.) Dennis, unlike the instant case, involved specific allegations of a conspiracy between the judge and counsel.

6/ The court's dismissal of the complaint for failure to state a conspiracy

claim against Judge Jourdane makes it unnecessary to consider the other arguments advanced by the parties. The Court, however, does refer the parties to Bynum v. City of Berkeley, 622 F. Supp 196 (N.D. Cal 1985). In Bynum, Judge Patel expressly held that the one year statute of limitations recognized in Wilson v. Garcia, --U.S.--, 105 S. 105 S. Ct. 1938 (1985), should not be applied retroactively so as to time bar section 1983 suits. This court has also ruled in an unpublished order. See Montanez v. City of Salinas et al., No. C-85-20061-WAI, filed August 1, 1985.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT M. SCHUCKER, Plaintiff, v. TERRY G. ROCKWOOD, et al., Defendants.	) NO. C-86-20009-WAI	JUDGMENT

In accordance with the accompanying Order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-entitled action is DISMISSED.

DATED: JUN 26, 1986

WILLIAM A. INGRAM
United States District Judge

SELECTED SECTIONS OF THE CALIFORNIA CODE OF CIVIL PROCEDURE (CCP)

Section 916. Stay of Proceedings in the Trial Court.

(a) Except as provided in Sections 917.1 through 917.9 and in Section 117.7, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

(b) When there is a stay of proceedings other than the enforcement of the judgment, the trial court shall have jurisdiction of proceedings related to the enforcement of the judgment as well an any other matter embraced in the action and not affected by the judgment or order appealed from.

Section 917.1. Judgment for Money or Directing Payment of Money.

(a) The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for money or directs the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action, unless an undertaking is given.

(b) The undertaking shall be on condition that if the judgment or order or any part of it is affirmed or the appeal is withdrawn or dismissed, the party ordered to pay shall pay the amount of the judgment or order, or the part of it as to which the judgment or order is affirmed, as entered after the receipt of the remittitur, together with any interest which may have accrued pending the appeal and entry of the remittitur, and costs which may be awarded against the appellant on appeal. This section shall not apply in cases where the money to be paid is in the actual or con-

structive custody of the court; and such cases shall be governed, instead, by the provisions of Section 917.2. The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount of the judgment or order. The liability on the undertaking may be enforced if the party ordered to pay does not make the payment within 30 days after the filing of the remittitur from the reviewing court.

(c) If a surety on the undertaking pays the judgment, either with or without action, after the judgment is affirmed, the surety is substituted to the rights of the creditor and is entitled to control, enforce, and satisfy the judgment, in all respects as if the surety had recovered the judgment.

(d) Costs awarded by the trial court under Chapter 6 (commencing with Section 1021) of Title 14 shall be included in the amount of the judgment or order for the purpose of applying subdivisions (a) and (b).

Section 917.15. Judgment or Order Relating to Hazardous Waste.

The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order appealed from, or the administrative order which is the subject of the trial court proceeding, was issued pursuant to either of the following:

(a) Subdivision (a) of Section 25358.3 of the Health and Safety Code and ordered a responsible party to take appropriate removal or remedial actions in response to a release or a threatened release of a hazardous substance.

(b) Section 25181 of the Health and Safety Code and ordered the party to comply with Chapter 6.5 (commencing with Section 25100) of Division 20 of the Health and Safety Code or any rule, regulation, permit, covenant, standard, requirement, or order issued, adopted or executed pursuant to that Chapter 6.5.

Section 917.2. Judgment Directing Assignment or Delivery of Personal Property.

The perfecting of an appeal shall not stay enforcement of the judgment or order of the trial court if the judgment or order appealed from directs the assignment or delivery of personal property, including documents, whether by the appellant or another party to the action, or the sale of personal property upon the foreclosure of a mortgage, or other lien thereon, unless an undertaking in a sum and upon conditions fixed by the trial court, is given that the appellant or party ordered to assign or deliver the property will obey and satisfy the order of the reviewing court, and will not commit or suffer to be committed any damage to the property, and that if the judgment or order appealed from is affirmed, or the appeal is withdrawn or dismissed, the appellant shall pay the damage suffered to such property and the value of the use of such property for the period of the delay caused by the appeal. The appellant may

cause the property to be placed in the custody of an officer designated by the court to abide the order of the reviewing court, and such fact shall be considered by the court in fixing the amount of the undertaking. If the judgment or order appealed from directs the sale of perishable property the trial court may order such property to be sold and the proceeds thereof to be deposited with the clerk of the trial court to abide the order of the reviewing court; such fact shall be considered by the court in fixing the amount of the undertaking.

Section 917.3. Judgment Directing Execution of One or More Instruments.

The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order appealed from directs the execution of one or more instruments unless the instrument or instruments are executed and deposited in the office of the clerk of the court where

the original judgment or order is entered to abide the order of the reviewing court.

Section 917.4. Judgment Directing Sale, Conveyance or Delivery of Real Property.

The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order appealed from directs the sale, conveyance or delivery of possession of real property which is in the possession or control of the appellant or the party ordered to sell, convey or deliver possession of the property, unless an undertaking in a sum fixed by the trial court is given that the appellant or party ordered to sell, convey or deliver possession of the property will not commit or suffer to be committed any waste thereon and that if the judgment or order appealed from is affirmed, or the appeal is withdrawn or dismissed, the appellant shall pay the damage suffered by the waste and the value of the use and occupancy of the property, or

the part of it as to which the judgment or order is affirmed, from the time of the taking of the appeal until the delivery of the possession of the property. If the judgment or order directs the sale of mortgaged real property and the payment of any deficiency, the undertaking shall also provide for the payment of any deficiency.

Section 917.5. Judgment Appointing Receiver.

The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order appealed from appoints a receiver, unless an undertaking in a sum fixed by the trial court is given on condition that if the judgment or order is affirmed or the appeal is withdrawn, or dismissed, the appellant will pay all damages which the respondent may sustain by reason of the stay in the enforcement of the judgment.

Section 917.6. Judgment Directing Performance of Two or More Acts.

The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order appealed from directs the performance of two or more acts specified in Sections 917.1 through 917.5, unless the appellant complies with the requirements of each applicable section.

Section 917.65. Enforcement of Right to Attach Order.

The perfecting of an appeal shall not stay enforcement of a right to attach order unless an undertaking is given. The undertaking shall be in the amount specified in the right to attach order as the amount to be secured by the attachment. The undertaking shall be on condition that if the right to attach order is not reversed and the plaintiff recovers judgment in the action in which the right to attach order was issued,

the appellant shall pay the amount of the judgment, together with any interest which may have accrued. The liability on the undertaking may be enforced if the judgment is not paid within 30 days after it becomes final. If a surety on the undertaking pays the judgment, either with or without action, the surety is substituted to the rights of the creditor and is entitled to control, enforce, and satisfy the judgment, in all respects as if the surety had recovered the judgment.

Section 917.7. Judgment Affecting Custody of Minor.

The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change, or otherwise affect the custody, including the right of visitation, of a minor child in any civil action, in an action filed under the Juvenile Court Law, or in a special proceeding, or the pro-

visions of a judgment or order for the temporary exclusion of a party from the family dwelling or the dwelling of the other party, as provided in Section 4359 of the Civil Code. However, the trial court may in its discretion stay execution of such provisions pending review on appeal or for such other period or periods as to it may appear appropriate. Further, in the absence of a writ or order of a reviewing court providing otherwise, the provisions of the judgment or order allowing, or eliminating restrictions against, removal of the minor child from the state are stayed by operation of law for a period of 30 days from the entry of the judgment or order and are subject to any further stays ordered by the trial court, as herein provided.

Section 917.8. Party Guilty of Usurping or Unlawfully Holding Public Office.

The perfecting of an appeal shall not stay proceedings, in the absence of an order

of the trial court providing otherwise or of a writ of supersedeas, where a party to the proceeding has been adjudged guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military within this state, or where the judgment or order directs a corporation or its officers or agents, or any of them, to give to a person adjudged to be a director, stockholder or member of such corporation a reasonable opportunity to inspect or make copies of such books, papers or documents of the corporation as the trial court finds that such director, stockholder or member is entitled by law to inspect or copy, or where the judgment or order adjudges a building or place to be a nuisance, and as part of such judgment or order directs the closing or discontinuance of any specific use of the building or place for any period of time.

Section 917.9. Undertaking Required to Stay Enforcement - Not Given.

(a) The perfecting of an appeal shall not stay enforcement of the judgment or order in cases not provided for in Sections 917.1 through 917.8 if the trial court, in its discretion, requires an undertaking and the undertaking is not given. The undertaking shall be in a sum fixed by the court; it shall be conditioned upon the performance of the judgment or order appealed from if the judgment or order is affirmed or the appeal is withdrawn or dismissed, and it shall provide that if the judgment or order appealed from or any part of it is affirmed, or the appeal is withdrawn or dismissed, the appellant will pay all damages which the respondent may sustain by reason of the stay in the enforcement of the judgment.

(b) For the purpose of this section, "damages" means reasonable compensation for the loss of use of the money or property.

Section 117.7. Execution of Judgments.

No attachment may issue from the small

claims division. The judgment may be enforced in the manner provided in Title 9 (commencing with Section 680.010) of Part 2 and in Section 1174. However, enforcement of the judgment is automatically stayed, without the filing of a bond by the defendant, until the expiration of time for appeal and, if an appeal is taken, until the appeal is determined.